Supreme Court of the United States

October Term, 1957

No. 4

CLAUDE MACK LIGHTFOOT,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY MEMORANDUM FOR PETITIONER ON REARGUMENT

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It is the purpose of this memorandum (1) to reply to respondent's Supplemental Memorandum [1] on the constitutional issue and (2) to demonstrate that *Yates* v. *United States*, 354 U. S. 298, requires an order for petitioner's acquittal.

1. The constitutional issue.

The respondent now concedes (Supp. Mem., 4-5) what was implicit in its earlier argument—that the membership clause, as written, is unconstitutional even if a specific intent to accomplish violent overthrow can be imported into the statute as an element of the offense.[2]

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[1] We refer to respondent's Supplemental Memorandum as "Supp. Mem.," the Brief for Petitioner as "Pet. Br.," the Brief for Respondent as "Resp. Br.," and the Reply Brief for Petitioner as "Pet. Rep. Br."

[2] Our principal brief so contended (Pet. Br. 48-54), and as we there showed (pp. 45-48) there is no warrant for reading a specific intent into the membership clause.

Nevertheless, respondent urges (Supp. Mem., 3-4) that the statute can be saved by limiting its application to persons who are "active" members of an organization which engages in the proscribed advocacy. Respondent defines an "active" member (Supp. Mem., 6) as one "who devote[s] all or a substantial part of his time and efforts towards carrying on the work of the organization to which he belongs and furthering its ends."

Respondent does not and cannot find any justification for this elaborate qualification of the familiar term, "member," in the language of the statute or in the legislative history. Respondent seems to suggest (Supp. Mem., 4) that these guides to statutory construction can be dispensed with by labelling the qualification "an external constitutional limitation on the validity of convictions under the Act" and not an element of the offense.[3] On this preposterous theory, no legislation can be invalidated for inherent unconstitutionality. For, if respondent is right, the courts are obliged to rescue an invalid statute by supplying the requisite "external constitutional limitations" without regard to the text of the law or other indicia of legislative intent.

Furthermore, respondent's reading of the term, "member," even if warranted, would not save the membership clause.

As we have shown (Pet. Br., 48-54; Pet. Rep. Br., 8-10), the membership clause is invalid because it violates the First Amendment principle that guilt may not be imputed solely from association, unaccompanied by any personal act of wrongdoing. The constitutional issue, therefore, is not whether the membership denounced by the statute is "active" or "passive." The issue is whether the statute

[3] Respondent does not bother to explain why the specific intent which it reads into the membership clause *is* an element of the offense while the "factor of 'activity,'" which it also supplies, is not.

authorizes a conviction without proof that an accused member has engaged in *unlawful activity*—i.e. activity that amounts to aiding and abetting, or conspiring to aid and abet, the unlawful advocacy of the organization. Unless the statute requires such proof, it is unconstitutional because it attaches criminality to the mere act of association. *De Jonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; *Whitney* v. *California*, 247 U. S. 357, 372 (concurring opinion); *American Communications Association* v. *Douds*, 339 U. S. 382. Cf. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232; *Konigsberg* v. *State Bar*, 353 U. S. 252.

Respondent's proposed application of the statute, however, permits a conviction on proof that the member engaged in nothing but innocent and, indeed, constitutionally protected activity. For, under respondent's definition of an "active" member (Supp. Mem., 6) it is enough that the member be shown to have devoted a substantial part of his time to "the work of the organization" and "furthering its ends." Obviously, an organization that advocates the violent overthrow of the government "as soon as circumstances permit" may have perfectly lawful intermediate goals for which it works. For example, whatever may be found to be the ultimate objective of the Communist Party, it cannot be denied that the day-to-day policies and activities of the organization are directed toward the realization of legitimate popular demands for reform. Yet, under respondent's theory of the statute, a member may be convicted upon proof that he devotes a substantial part of his time to these innocent activities. Obviously, if —as respondent concedes—a "passive" member may not constitutionally be convicted, there can be no warrant in the Constitution for the conviction of a member whose only organizational activity consists in advocating the peaceful implementation of this Court's decisions on racial integration.

Plainly, therefore, the limitation on the application of the membership clause which respondent proposes cannot save its constitutionality.

Respondent carefully refrains from suggesting that the application of the membership clause should be limited to members who are "active" in advocating violent overthrow or in aiding and abetting, or conspiring to aid and abet, the advocacy of political violence by the organization. Under *Dennis* v. *United States*, 341 U. S. 494, a statute so limited would be constitutional. But as respondent seems to recognize, Congress could not possibly have intended to give the membership clause so restrictive an application. For, so limited, the clause would be wholly redundant.[4] The advocacy provisions of the Smith Act and the general conspiracy statute are available for the punishment of members who advocate or conspire to advocate the proscribed doctrine.[5] Hence, the membership clause adds nothing to the Act unless it reaches members who are either passive or whose organizational activity is confined to innocent conduct. But so construed—as it must be if regard is had for the plain intent of Congress—the membership clause is unconstitutional.

2. The applicability of *Yates v. United States*.

Petitioner was charged with membership in the Communist Party, knowing that it engaged in the proscribed advocacy. Obviously, petitioner could not "know" that the organization was so engaged if, in fact, it was not. The Government was therefore required to prove, as the

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[4] It would also require petitioner's acquittal. For respondent concedes (Resp. Br., 36) that there was no evidence of proscribed advocacy by or in the presence of petitioner during the three years prior to the return of the indictment.

[5] The Government has tried the Smith Act conspiracy cases on the theory that the Communist Party was the conspiratorial group. See, e.g., *Yates* v. *United States*, *supra*, at 329.

foundation for its case, that the Communist Party advocated violent overthrow, and did so in language calculated to incite persons to action.[6]

The evidence offered by the Government on this phase of the case consisted of (1) excerpts from the Marxist "classics" and (2) the opinion testimony of Lautner (Pet. Br., 35-41; Pet. Rep. Br., 4-5; Resp. Br., 50ff). The excerpts from the classical literature were identical with those held insufficient in *Yates* (at 327, 329-30), and Lautner testified that the Communist Party advocated a peaceful path to socialism (Pet. Br., 35-36; Pet. Rep. Br., 5).

Yates held, on far more detailed and elaborate evidence concerning the Communist Party than is contained in the present record, that there was no proof that the organization engaged in incitement to revolutionary violence. That decision confirms our contention that the evidence in this case relating to the advocacy of the Communist Party affirmatively establishes petitioner's innocence (see Pet. Br., 44; Pet. Rep., Br., 4-6).

In contradistinction to *Yates* (see p. 328), the Government was under no misapprehension here as to the burden cast upon it by the statute under which the indictment was laid. And since the evidence against petitioner "would be palpably insufficient on a new trial" (*ibid.*), the decision in *Yates* requires an order for petitioner's acquittal.

Respectfully submitted,

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[6] The trial court so instructed the jury (Pet. Br., 5).